

No. 12,242

IN THE

United States Court of Appeals
For the Ninth Circuit

OVE FOG,

Appellant,

VS.

R. C. WILLIAMS & Co., INC.,
a corporation,

Appellee.

BRIEF FOR APPELLANT.

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JURISDICTIONAL FACTS.

The action was brought in the United States District Court because of diversity of citizenship, the plaintiff being a resident of the City and County of San Francisco, State of California, and the defendant being a resident of the City of New York, State of New York, the amount in dispute being in excess of \$3000.00.

The complaint was filed in the United States District Court on June 8, 1948. (R. 2-9.)

The Findings of Fact were filed in the United States District Court on January 14, 1949 (R. 21-31), and the

Judgment entered in the Civil Docket January 20, 1949. (R. 32.)

A Motion for New Trial and Notice of Motion for a New Trial were filed in the United States District Court on January 31, 1949 (R. 33 and 34); the order denying the Motion for a New Trial was filed March 23, 1949. (R. 35.)

The Notice of Appeal to the Circuit Court of Appeals under Rule 73(b) of the United States Code of Civil Procedure was filed on April 22, 1949. (R. 35.)

The appeal was taken within thirty days after the giving and filing of the Notice of the entry of order denying plaintiff's Motion for a New Trial.

Jurisdiction is conferred upon the Honorable Court to review the final judgment of the District Court of the United States by Section 128 of the Judicial Code, as amended (Title 28 USC 1921) wherein it is proved that:

“The Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Court of the United States * * * except where a direct review may be had to the Supreme Court.”

SPECIFICATIONS OF ERROR.

At the conclusion of plaintiff's case defendant's counsel presented a Motion to Dismiss the action under Section 41 (b) of the Rules of Civil Procedure for the United States District Court upon the ground that plaintiff under the facts and law had shown no

grounds for relief. (R. 287.) The Judge of the District Court granted said motion and directed the preparation of findings. The court further denied plaintiff's motion for a new trial.

In granting said motion to dismiss and in denying said motion for a new trial the court did so on the ground that the evidence showed:

1. That no fraud was practiced upon plaintiff by defendant corporation or any of its officers and no misrepresentations were made by them to him to induce him to enter into the settlement. (Findings X, R. 29), and on the ground—

2. That plaintiff at all times knew all the facts concerning the importation and sale of Harwood Whiskey within his territory. (Finding VIII, R. 28.)

Appellant specifies said findings to be erroneous as not supported by the evidence.

It will be urged by appellee that all inferences and intendments should be indulged in in support of the judgment. We will show, however, that misrepresentations were made up to the very moment of settlement and that under no circumstance could it be inferred that Mr. Fog could have known that the Williams Company was not importing Harwood Whiskey from the distillery at Vancouver but from the Agencias Distiladores of Cuba. Most certainly he could not have known facts and circumstances under which the whiskey was purchased and imported from the Cuban corporation.

STATEMENT OF THE CASE.

This appeal is taken from the judgment of the United States District Court rendered in granting defendant's motion to dismiss the action made under Section 41 (b) of the Rules of Civil Procedure at the conclusion of plaintiff's case. Said motion was made on the asserted ground that under the facts and the law the plaintiff had shown no right to relief. (R. 287.)

The action is one to set aside a purported settlement of the claim of plaintiff against defendant on the ground that the said settlement was obtained through misrepresentation and fraud and further for an accounting.

It is appellant's contention that the trial court erred in granting the motion in that the law and evidence fully supports and substantiates the cause of plaintiff.

THE FACTS.

The defendant, R. C. Williams & Co., Inc., is a New York corporation engaged in the business of importing and merchandising wines, spirits and liquors as exclusive sales agent which merchandise was sold by defendant throughout the several states and territories of the United States. It is a large concern doing an annual business of from \$15,000,000 to \$25,000,000 in its liquor division alone. It transacted its liquor business, aside from its wholesale business in the Metropolitan area of New York, under the designation of "Continental Import Division of R. C.

Williams & Co., Inc.” and later through “Williams Importers, a Division of R. C. Williams & Co., Inc.” These divisions were not separate entities or corporations but merely departments or “desks” of R. C. Williams & Co., Inc.

In May, 1942, plaintiff, Ove Fog, was approached by one Jean Ravaud, the representative of R. C. Williams & Co., Inc., and after negotiations was appointed manager by defendant of the western branch of the liquor division of defendant corporation for the sale and distribution of the various wines, spirits and imported liquors handled and dealt in by defendant corporation. The territory assigned to plaintiff comprised the states of California, Nevada, Arizona, Washington, Oregon, Utah, Idaho, Montana, Wyoming, New Mexico and the territories of Hawaii and Alaska. Plaintiff's compensation as manager for said western division was agreed to be on the basis of a minimum fee plus an all around commission on all wines, spirits and liquors sold and delivered by defendant throughout the area computed as follows: 10 cents per case for the first 5000 cases; 15 cents per case for 5000 to 10,000 cases; 20 cents per case for 10,000 to 15,000 cases and 25 cents per case for all over 15,000 cases. (R. 91.) Other than this their agreement was not in writing but was recognized as a “gentlemen's agreement”. (R. 86.)

At the conferences in San Francisco between Mr. Fog and Mr. Ravaud relating to Mr. Fog's appointment, it was represented to him and he was assured that the liquor division of R. C. Williams & Co., Inc.,

was large and growing and that additional lines of liquors were to be acquired and by reason thereof Mr. Fog's compensation would be greatly enhanced. He was further assured that all merchandise shipped into his territory by R. C. Williams & Co., Inc., would be through his department.

At the time of Mr. Fog's appointment R. C. Williams & Co., Inc., did not then have the representation or handle the importation of Harwood's Whiskey, a Canadian product. It acquired the exclusive sales rights for the United States in May, 1944. (Exhibit 20, R. 270.)

In the latter part of 1944 Mr. Fog discovered that bottles of Harwood Whiskey were appearing on the shelves of distributors in his territory marked as "Imported by R. C. Williams and Co. Inc." None of these sales were handled through Mr. Fog's branch office but were made direct by R. C. Williams & Co. Inc., as importer and he received no commissions thereon nor was any accounting rendered him relative to the sales of Harwood Whiskey in his territory.

Upon the appearance of Harwood Whiskey in his territory Mr. Fog made inquiry of Mr. Ravaud by telephone and letters for an explanation and requesting his commissions, reminding him that he had been assured that all such shipments would be made through his office.

There were numerous letters, telephone conversations and meetings regarding the subject with which we will deal in detail in our argument. In all of these,

representations were made in an effort to explain and satisfy Mr. Fog that he was not entitled to commissions. Ultimately Mr. Fog was called to New York for a conference regarding the subject of his commission claim. At this meeting, at which were present Mr. Hugo Jaburg, President of R. C. Williams, Jean Ravaud, General Manager of the Import Division. The suggestion was made that the matter be arbitrated (R. 151). At the same time, September 13, 1945, Mr. Fog was given written assurance that no merchandise would be shipped into his territory by R. C. Williams & Co., except through his office. This assurance was in the form of a letter confirming a verbal conversation made in December, 1943, to this effect. (Plaintiff's Exhibit No. 14, R. 150.)

The proposed arbitration never took place. Then in February, 1946, the gentlemen again met at the Palace Hotel in San Francisco, and the matter further discussed in a series of meetings. At these meetings Mr. Fog was again assured that nothing could be done about his commissions, that he was not entitled to any commissions, and reasons were advanced. The final outcome was that Mr. Fog because of his trust and confidence in them and their intimate personal relations was convinced by the representations made to him that he was not entitled to commissions. (R. 155.) Mr. Jaburg as a gesture of good will and in order to send him back to the coast in a right frame of mind (R. 67) agreed that Mr. Fog be given \$10,000 and that an agreement be drawn up to avoid further misunderstandings, again assuring him that he would be

protected against R. C. Williams & Co., shipping merchandise into his territory. (R. 168.) Under date of March 8, 1946, Mr. Fog received correspondence relative to the proposed settlement. (R. 171; Plaintiff's Exhibit 17.) These agreements omitted the essential provision for protection to Mr. Fog against shipments by R. C. Williams & Co. into his territory, and he wrote back (R. 180) in protest enclosing a draft of the terms as he understood them. (R. 182.)

Mr. Fog was next called to New York for a further conference and the question of his protection was discussed and after assurance that he was already protected (R. 189, 193) he signed the agreement in their original form and was given the \$10,000.

Subsequently, in April, 1947, Mr. Fog was requested to submit his resignation (R. 194), which he did.

On January 28, 1948, Mr. Fog was subpoenaed by the Bureau of Internal Revenue to produce correspondence relative to the sale of Harwood Whiskey. During the course of his examination by a Mr. Gaines of the Bureau of Internal Revenue Mr. Fog for the first time learned that R. C. Williams & Co. actually were buying Harwood Whiskey at one price, marking it up and selling at another, contrary to the representations made to him that they as agents were merely clearing the merchandise as a service to the Canadian Distillery. (R. 100; 196-197.)

Important as bearing on the matter of discovery is the fact that neither Mr. Fog nor his counsel learned that R. C. Williams & Co. was in fact importing Har-

wood Whiskey, not from the Canadian Distillery but had the exclusive sales agency from a Cuban corporation, the Agencias Distiladores S. A. This fact was not revealed until shortly before the trial when the contract was produced. (R. 270.)

ARGUMENT ON THE GRANTING OF THE MOTION TO DISMISS.

The essence of this case is the granting of the motion to dismiss. The court recognized that plaintiff had a valid claim for commissions (R. 298, 305) because defendant was shipping Harwood Whiskey into Mr. Fog's territory, and that therefore under his contract he was entitled to get his commissions (R. 305.) However it denied him relief on the ground that he knew that fact when he accepted the \$10,000. Of this the court said (R. 304):

“The Court. And it doesn't make any difference as to the technicalities or means by which that was accomplished. That is the basis, that this man would have this claim against the defendants under his agency contract. So therefore, there is no question of any misrepresentation as to the mode by which it was done, because the essence of his claim is not the means by which defendant caused the whiskey to be introduced into this market, the papers that they signed, the nature of their contract, but the fact that they caused the whiskey to be introduced into this market that affects his position under his contract with them, and that fact he knew. *There was no misrepresentation about that. Nobody concealed that from*

him. That is the claim he is asserting against him that if this whiskey was to be introduced into this market, it had to be through the concern with whom he had the contract, and that they had agreed with him that everything that came into this market would be through that import division, and therefore if they did bring whiskey in, and they did bring it through the importing division, if the defendant did that, then by virtue of that fact, he was entitled to get a commission on that''.

From that statement, which is the basis of its decision, it is evident the court labored under a misconception of the issues. That statement of the court that "there was no misrepresentation about that. Nobody concealed that from him", is entirely incorrect and erroneous. True, Mr. Fog knew that Harwood Whiskey was shipped into his territory and that it bore the label "R. C. Williams & Co. Importers", but when Mr. Fog demanded his commissions defendants explained that though their name appeared on the bottles they were only acting on behalf of the distillery; they denied his right to commissions and used every artifice and device to deceive him and convince him that his claim for commissions was without foundation. Consistently pursuing their course throughout their negotiations, defendants did succeed in perpetrating a fraud upon plaintiff and did induce him in reliance upon their representations in accepting the sum of \$10,000.00, not in settlement of his claim but "to take a bitter taste out of his mouth". (R. 67.)

THE MISREPRESENTATIONS.

When Mr. Fog learned that Harwood Whiskey was being shipped into his territory with R. C. Williams & Co., label as importer, he made inquiry by telephone and letter. (R. 94; Plaintiff's Exhibit 4, R. 96.) He received a reply from a Mr. Ackerman, Assistant Manager for Continental Imports Division of R. C. Williams & Co., under date of October 20, 1944. (Plaintiff's Exhibit 5; R. 101.) In this letter Mr. Ackerman states:

"Several of our distributors have written to us about Harwood Canadian Whiskey, as R. C. Williams' name appears on the bottle as the sole United States distributor importer.

"Actually our company has had nothing to do with the sales representation of this item. All sales were made by representatives of the distillery, and at their terms. As a service to the Canadian distillery R. C. Williams & Co., Inc., 265 Tenth Avenue, New York City, merely cleared all United States sales for them, and served as a wholesaler in New York City for this product."

He also received a reply from Mr. Ravaud under date of October 21, 1944 (Plaintiff's Exhibit 6, R. 104):

"I have received your memorandum of October 18th regarding the question of the Canadian Whiskey distributed by R. C. Williams, and no doubt you have received a letter of explanation from Mr. Ackerman on the subject.

“I would like to confirm, however, that we had a long meeting with Mr. Jaburg, Mr. Koerner and George Ackerman and myself after the reception of the telegram and letter from Oscar. By telephone I explained the situation to you which is as follows:

R. C. Williams wholesale department have the exclusive franchise of this whiskey in New York, provided they accommodate the Canadian Distillers by clearing the merchandise for them and do the billing in the United States. This is exactly what has happened, for as a matter of fact, Koerner has nothing to do with the sales which are made by the representatives of the UDL Distillers in Vancouver. * * * As you know, we are not making any money at all on the Canadian Whiskey and outside of a moral obligation, I have been glad to obtain the merchandise for Parrott & Co., having in mind they will use this whiskey to push our other items.”

Under date of October 27, 1944, Mr. Fog received another letter from Mr. Ackerman reiterating the fact that “they have nothing to do with setting of the terms any more than we had anything to do with the sale of the whiskey”. (R. 108.)

Early in the trial the court interrupted to make certain it understood the issues in the case. (R. 113.)

“The Court. Then the defendant contends it did not make any sales at all.

Mr. Farraher. That is right. It made no direct sales.

The Court. That is what I mean, that it made no sales, that *it was getting paid for the service*

it rendered in distributing, billing and distributing.

Mr. Farraher. That is right.

The Court. That it actually made no sales at all?

Mr. Farraher. That is right.

The Court. Your position is there were no sales made.

Mr. Farraher. That is right.

The Court. It makes no difference whether that is the Import Division or the R. C. Williams & Company."

Again at page 114:

"The Court. I am commencing to see what the issues are.

Mr. tum Suden. Our position is, if the Court please, that they did import this Harwood Whiskey, and under their contract with Mr. Fog they shipped it into this territory regardless of how the sales were made.

The Court. Your position is, irrespective of whatever the arrangement was, the plaintiff being the sole representative of the defendant here on this coast, is entitled to so much per case for all this whiskey that was handled irrespective of the method of handling it by the defendant. That is your position.

Mr. tum Suden. That is right, yes. They had an agreement that they would ship nothing in here except through his division and they imported it at one price and sold it at another.

The Court. All right. Now defendant says that that dispute did exist and we settled it. We paid them \$10,000. And your position is that that

dispute was settled, it is true, but it was settled on the basis of some representation which you subsequently discovered was not correct.

Mr. tum Suden. That is right.

The Court. We understand each other now as to what dispute it was that was settled or attempted to be settled."

The above is declaration of issues, the defendant asserting again and again that Williams made no sales whatsoever. The above statement and admissions by defendant's counsel is in direct conflict with the finding of the court that Mr. Fog knew at all times Williams was mailing sales.

Next we refer to plaintiff's Exhibit 8, R. 117, being a letter from Mr. Geo. M. Ackerman under date of December 19, 1944. In this letter Mr. Ackerman states that he has Mr. Fog's letter to Mr. Ravaud dated December 15, 1944, and in which he states that Mr. Irving Koerner is definitely in charge of shipments from the *distillery*.

Then on February 2, 1945, Mr. Fog wrote Mr. Ravaud (Plaintiff's Exhibit 9, R. 119) reasserting his claim for commissions and protesting the shipment of Harwood Whiskey into his territory. This letter clearly reveals that Mr. Fog was ignorant of the method of operation of R. C. Williams & Co., in handling the whiskey. In this letter he states that he was given the impression that there was no profit in such transactions and and that it was a matter of courtesy to cooperate. He reminds Mr. Ravaud of the agreement that R. C. Williams & Co. would not oper-

ate directly in his territory except through his department.

Under date of February 6, 1945, Mr. Fog received a letter from Mr. Ackerman in response to Mr. Fog's letter of February 2nd to Mr. Ravaud. In this letter Mr. Ackerman reported a meeting of R. C. Williams & Co.'s executives in regard to Harwood Whiskey shipments into Mr. Fog's territory. The important part is as follows:

"It is true that other agents hired by UDL are paid by R. C. Williams, as that is the law as long as our name appears on the bottles. However this money originally comes from UDL."

"No matter what the outcome is, please forget about your commissions arguments on this whiskey. It is definitely impossible, and it is weakening my position, etc." (Plaintiff's Exhibit 11, R. 125.)

Under date of February 12, 1945, Mr. Fog wrote a long letter to Mr. Ravaud reviewing their correspondence and fully explaining his position in regard to the dispute over his commissions. (Plaintiff's Exhibit 12, R. 137.) This letter was a review of the former correspondence and expressed his inability to understand the various explanations given him why he is not entitled to his commissions. He comments on the fact that he was given to understand that this business was handled without profit and yet he is also informed that R. C. Williams does not make more than one dollar per case. This letter was not answered by Mr. Ravaud until March 5, 1945, by letter in which

Mr. Ravaud refers to the matter as the "Harwood Whiskey Mystery". (R. 145.) He does not deny the justness of Mr. Fog's claim for commission or take issue with him on any statement but evades the subject by the assertion that Mr. Fog is not working for R. C. Williams & Co. but for Williams Importers. Nevertheless he promises a solution which however never materialized.

In addition to the documentary letters Mr. Fog testified that there were numerous meetings, conversations, telegrams and telephone calls at which the subject was discussed.

When the meetings were held with Mr. Ravaud relative to his employment he was assured that all merchandise sold by R. C. Williams would be through his office. (R. 79.) This testimony is verified by the testimony of Mr. Ravaud given on the taking of his deposition (R. 59 and 60) as well as by letter (R. 86; Exhibit 14, R. 150.)

Mr. Fog testified that there were many conversations. (R. 147.) In one instance Mr. Ravaud stated that he could do nothing about the Harwood situation because it was not handled by R. C. Williams, it was invoiced but that was on behalf of the distillery.

Again he relates the conversations at the meeting in September, 1945, in New York. He discussed the matter with Mr. Jaburg who denied his right to a commission with the explanation "that it was a different deal". (R. 148.) He testified that at the meeting in March, 1946, at the Palace Hotel Mr. Jaburg

again informed him that he had no valid claim to commissions. (R. 154.) Mr. Jaburg confirms the fact of these late conversations and that he told Mr. Fog that there was nothing they could do about his commissions. (R. 50 and 51.) Mr. Jaburg testified that the orders for Harwood Whiskey were placed by brokers appointed by the distiller. (R. 47 and 48.)

Thus it will be seen that various reasons were advanced by defendant for avoiding the payment of commissions to Mr. Fog. There is no testimony or evidence that the true situation was revealed to him. Both Mr. Jaburg and Mr. Ravaud on the taking of the deposition, which testimony was referred to in the motion for a new trial, in substance testified and admitted that upon the final meetings in New York and at the Palace Hotel that such conversations were held and that they denied Mr. Fog's right to commissions.

It will be recalled that counsel for defendant, in response to the court's inquiry, stated that it was a fact "that R. C. Williams & Co. did not make any sales at all." (R. 113.)

It will be further recalled that under the "gentlemen's agreement" it was agreed that Mr. Fog would be paid commissions on all items shipped into his territory by R. C. Williams directly or through its Williams Importers Division. (See Plaintiff's Exhibit 14, R. 150.)

Early in their relations R. C. Williams did ship directly several carloads of Puerto Rico rum into Mr. Fog's territory, and upon reminder of the agreement

assured Mr. Fog it would not make such direct shipments in the future. (R. 93.) Mr. Ravaud, in his deposition confirms this incident. (R. 60.)

When reminded of this situation and of this agreement at the meeting in New York in September, 1945, between Mr. Jaburg, Mr. Ravaud and Mr. Fog, Mr. Jaburg admitted it but flatly told Mr. Fog "Oh yes but that is a different deal, we don't sell it". (R. 148.) At that same conference Mr. Ravaud told Mr. Fog that they couldn't do anything about Harwood because it was not handled by them or by R. C. Williams; "it was invoiced, but that was on behalf of the distillery." (R. 147.)

In other words, the picture of the situation painted for Mr. Fog throughout the entire history of this dispute and up to the very moment of the alleged "settlement" was that R. C. Williams did not sell Harwood but only handled it as a matter of accommodation for the distillery. That all sales were made by distributors for the distillery and R. C. Williams merely did the clearing and billing, for which it received a compensation of \$1.50 a case (R. 54) out of which R. C. Williams had to pay the brokers for the distillery their commissions. That they netted not more than \$1.00 per case. His right to commissions is independent of R. C. Williams' profit. He was informed that this agreement was by contract between R. C. Williams and UDL (the distillery in Vancouver) in consideration for the privilege of wholesaling Harwood in the New York Metropolitan area.

The explanation given by Mr. Jaburg on the taking of his deposition is as follows:

“Harwood Whiskey was handled by R. C. Williams on an entirely different basis than in our Import Division. While we acted as a distributor for the brand in the United States at the insistence of the distillery, it was not included in our regular import division due to the fact that this distiller had certain distributors of his own through whom he had sold other products and he insisted upon having these distributors handle Harwood as a different item and he also insisted on appointing his own sales force who acted as brokers and received a brokerage on the sale of this whiskey”. (R. 47.)

The facts were entirely different. R. C. Williams had no contract with the distillery. Harwood Whiskey was purchased and imported by R. C. Williams from the Agencias Distiladores SA, a Cuban corporation. This corporation had the sales agency for Harwood Whiskey and it entered into a contract for exclusive sales in the United States with R. C. Williams under date of April 18, 1944. This was subsequent to Mr. Fog's employment by R. C. Williams. Under this contract Agencias Distiladores appointed R. C. Williams the exclusive sales agent and distributing agent for the sale of “Harwood's” in the United States of America. Under this contract R. C. Williams was to pay \$19.05 per case and was to sell the whiskey in the United States at \$20.77 per case at a profit of \$1.60. Article Seventh of the contract provided that title to all shipments was to pass f.o.b. Vancouver, Canada,

and R. C. Williams assumed all risk of loss after the merchandise was loaded on railroad cars at Vancouver and bill of lading issued. (See Plaintiff's Exhibit 20, R. 270.) These provisions establish the fact that R. C. Williams was not the agent for the distillery but had the exclusive sales rights in the United States for its own account.

This contract did not come to light until shortly before the trial and neither plaintiff nor his counsel knew the terms thereof prior to that time. It is thus clear, beyond dispute, that the explanations given Mr. Fog were false and untrue and the entire situation was repeatedly misrepresented to him. R. C. Williams & Co. had the exclusive sales rights and imported and sold Harwood just as it did any other brand and upon which it was obligated to and did pay Mr. Fog commissions.

But the trial court, in granting the motion to dismiss did so on the ground that Mr. Fog was fully informed on all the facts. Its reasoning appears to be that because Harwood appeared in Mr. Fog's territory with the label of R. C. Williams as importer that he must perforce have known all the circumstances, terms and conditions under which Harwood was imported. The court stressed the fact that Mr. Fog accused R. C. Williams of shipping into his territory in a statement prepared for the suggested arbitration. This statement was prepared as a statement of his case. It was never used. The statement was prepared quite some time prior to the subsequent nego-

tiations which led to the settlement. In the intervening period defendants continued their representations and in furtherance thereof gave him the written guarantee of September 13, 1945.

The giving of this guarantee more than anything else convinced Mr. Fog that Williams & Co. was not selling Harwood for their own account. It was inconceivable to him as it would be to anyone else that such a guarantee would be given by Mr. Jaburg if in fact Williams did sell Harwood. This act on Mr. Jaburg's part convinced him that Mr. Jaburg was telling the truth, ultimately convinced Mr. Fog that he was not entitled to commissions. They were his superior officers and pretended to be his friends. He was entitled to and did trust and believe in them. He had no other sources of information. In the final stages they reassured him R. C. Williams was not selling or shipping into his territory. "That it was a different deal." They assured him that if the Williams Co. did so ship or sell he would get his commissions. To further influence him, they agreed to give him the \$10,000.00, not in payment on account of commissions but as a gesture of good will. (R. 67.) That gesture itself was an act of misrepresentation as well and calculated to influence and convince Mr. Fog of the truth of their representations that he was not entitled to commissions.

AS TO MR. FOG'S KNOWLEDGE.

The question of Mr. Fog's knowledge is inextricably interwoven with the evidence of misrepresentation. All of these misrepresentations were calculated to convince Mr. Fog that he was not entitled to commissions. It never once appeared in the record that the true situation was explained or revealed to Mr. Fog. On the contrary the evidence proves that the defendant used every means, subtle and direct, to prevent his knowing the true facts. How then in the face of this situation can the court infer that nevertheless Mr. Fog actually knew all the material facts of the transaction? It must be obvious that if Mr. Fog knew the facts, knew that his claim for commissions was sound and that he was entitled to over \$100,000.00 that he would have accepted the \$10,000.00 in "settlement" thereof.

The evidence conclusively proves that Mr. Fog could not have known the true facts. How could he have known that Williams & Co. was not transacting business with the Distillery in Canada but was purchasing and importing the whiskey from Agencias Distiladores from Cuba? He could not have known the terms and provisions of their contracts. The accusation made in his argument for arbitration was only a statement of what he hoped to establish. It was not proof that he knew or had actual knowledge of all the real facts.

"It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual

knowledge on his part. * * * The court will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded."

Victor Oil Co. v. Drum, 194 Cal. 226, 241;

Simmons v. Briggs, 69 Cal. App. 447, 464.

We contend this case comes squarely within the principles quoted in *West v. Great Western Power Co.*, 36 Cal. App. (2d) 403, 414:

"Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on or being misled by it, *must be clearly and conclusively established by the evidence.*" (Emphasis ours.)

Mr. Fog did not discover the fact that Williams Co. actually imported the whiskey for their own account until he was subpoenaed by the Bureau of Internal Revenue on January 28, 1948. (R. 195-197.) Even then he did not know all the facts. It was not until his counsel shortly before trial learned that Williams & Co.'s contractual relations were not with the Distillery but were with a Cuban corporation, the *Agencias Distiladores*.

CONCLUSION OF ARGUMENT.

We submit that the trial court's findings that plaintiff knew all the facts concerning the importation of Harwood Whiskey and that no deception was prac-

ticed upon him by defendant are erroneous and are not supported by the evidence. The decision was made at the conclusion of plaintiff's case. The defendant presented no evidence. The evidence is all one way, documentary and oral. The trial court could only arrive at its decision by the resort to inference, conclusions or surmises, which are not warranted or supported by the evidence. The evidence for plaintiff was clearly, amply and firmly established by an unbroken line of evidence. There was no real or substantial conflicting evidence. Standing alone the admissions of defendant's officers that at the time of settlement plaintiff was informed that no commissions could be paid him, as it was a different deal together with the last minute production of the Agencias Distiladores contract conclusively establish that plaintiff could not have known the real facts concerning the sale of Harwood Whiskey. Certainly it cannot be said that plaintiff's knowledge of the real facts, which shall prevent his recovery in this case, was clearly and conclusively established by the evidence.

We respectfully submit that the judgment herein should be reversed.

Dated, San Francisco, California,
September 7, 1949.

TUM SUDEN AND TUM SUDEN,
Attorneys for Appellant.